IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 725 of 2000

WITH

CIVIL REVISION APPLICATION NO. 726 OF 2000.

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No. : NO

2. To be referred to the Reporter or not? No. :

3. Whether Their Lordships wish to see the fair copy of the judgement? No. : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No. : NO

5. Whether it is to be circulated to the Civil Judge? No. : NO

RAMSINGHBHAI HATHIBHAI SODHA-PARMAR

Versus

FATABHAI MANGALBHAI PARMAR

Appearance:

MR HM PARIKH for Petitioner

MR DIPAK R DAVE for Respondent No. 1

RULE SERVED for Respondent No. 8, 9

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 08/09/2000

ORAL JUDGEMENT

The plaintiff preferred Regular Civil Suit No. 376/99 for declaration and permanent injunction. The

plaintiff also filed an application exh. 5 for interim injunction for restraining the defendants from using the land of the petitioners as a way. The defendants also filed an application exh. 23 for interim injunction that the plaintiffs be restrained from using the way existing on the land bearing Block No. 134. The trial Court allowed the application exh. 5 and dismissed the application exh. 23 by common order.

2. Being aggrieved by the order passed by the trial Court preferred Civil Misc. Appeals No. 162 and 163 of 2000. The lower appellate Court set aside the order passed by the trial Court and allowed both the appeals and dismissed the application exh. 5 and allowed the application exh. 23 by common judgment and order. Against that common order of the lower appellate Court, the present revision applications have been filed before this Court.

3. Learned counsel for the petitioner contended that on the basis of the findings recorded by the lower appellate Court "No doubt in the present case some alternative arrangement is made by filling up the canal and putting pipe over it to go to the fields of the defendants. So the easement of necessity would not survive." On these findings, the learned counsel for the petitioner submitted that easement of necessity does not survive as soon as the alternative arrangement has been made by the parties concerned. So far as the easement by prescription is concerned, that has to be proved by the evidence to be led by the parties and in that connection he has relied on the decision of this Court in the case of Rameshchandra Bhikhabhai Patel Vs. Sakriben wd/o Maneklal Maganlal Patel and another reported in 1978 (19) GLR 329, wherein it has been held as under :

> "Easement of necessity would no longer be available when alternative way is available to the claimant of that right. However, the action on the part of the co-owner or any action on the part of the owner of the dominant heritage cannot work to the detriment of the owner of the servient heritage. In other words, it was not open to the plaintiff to so divide their properties that the burden on the servient heritage of the defendants, which burden was contingent on the non-availability of any alternative way for the dominant owners could continue to have servient heritage have one servient heritage even after the contingency ceased. Simply, because the plaintiff and

another person had taken into their heads to divide the property in such a way that for all time to come the servient heritage would continue to remain burdened, the defendants cannot be made to suffer. In another words that could not for all time to come take away that contingency and convert the contingent right into an absolute right. No doubt it was an incident of joint ownership that they would divide their heritage. This cannot ordinarily be denied. However, the co-owners must remember that to their property which was joint erstwhile a contingent right was annexed and which right would be lost on certain contingencies disappearing . They were expected, may, they were bound to carry out their affairs including the act of partitioning their estate, in such a way that contingent right of servient owner would not be lost for ever.

4. He has further relied on the decision of this Court in the case of Bai Champa wd/o Natvarlal Mohanlal And Another Vs. Dw3arkadas Mohanlal reported in 1969 (8) G.L.R. 965, wherein it has been held as under :

"On plain reading of Section 5 of the Indian Easement Act together with illustration (b), it becomes clear that a right of way while no doubt is an apparent easement, it is not a continuous one, for that depends upon the enjoyment of a continual character by the act of man. Before clause (f) of Sec. 13 were to apply to any such right, it must fulfil four conditions contemplated therein. They are : (1) that a joint property is partitioned between the parties, (2) the claim on (portion) is in respect of an easement which is apparent and conditions; (3) such an easement is necessary for enjoying the share of the other as it was enjoyed when the partition took effect; and (4) unless a different intention is expressed or necessarily implied.

5. He has further relied on the decision of Allahabad High Court in the case of Vidya Sagar and Another Vs. Ram Das and Another, reported in AIR 1976 415, wherein it has been held as follows :

"It is a common, for one cultivator to pass over the Mend of another cultivator as a means of access to his own field and such user of the Mend for agricultural purposes is, generally speaking,

never objected to and is, therefore are nothing but permissive. No easementary right, therefore, can be acquired by use of a Mend as a passage unless there is clear evidence of such user is a matter of right.

6. Thus, the contention of the learned counsel for the petitioner is that there is an alternative way available to the defendants for using the land as a way, the defendants cannot be permitted to use the land of the plaintiffs by prescription. Moreover, the easement by prescription can only be established by leading the evidence by the parties concerned. Without any finding on that point, the lower appellate Court has committed an error and illegality reversing the order passed by the trial Court in respect of the way through the defendants' field.

7. On the contrary, the learned counsel for the respondent contended that there was no way at all for the defendants as is obvious from the first Panchanama made by the Court Commissioner on 25-9-1999, wherein it has been shown that there was no way to go from Maholel-Paldi to the field of the defendants because of canal in between them and the defendants have stated that the plaintiff has forcibly restrained the defendants from passing through Block No. 134 and therefore they have made some alternative arrangement over the canal for going to their respective fields. Another Court Commissioner's report dated 5-3-2000 was submitted. From that report it is evident that the fresh and recent arrangement has been made to go to the fields of the defendants from Maholel Javol. It is submitted that if the alternative arrangement has been made by the defendants, the plaintiff cannot take the advantage of fresh and recent arrangement. It is also pointed out by the learned counsel for the petitioner that the lower appellate Court has relied on the document of the year 1929 for the sale of block No. 82/2. From that document it appears that Survey No. 82/2 is servient heritage and if one has to go to Survey No. 82/3, then one has to pass and use Survey No. 82/2 along with their respective carts. So, in the year 1929 this block was also used for going to the other fields. From the document of 1959 mark 44/3 it appears that the owners of the fields on the western side of Block No.134, are having the right of way over survey number from the northern side of this survey number. As such, the defendants and their ancestors were using Survey No. 82/2 which is merged in Block No. 134/B to pass through and from the fields while coming from Maholel - Javol road. There was no other

alternative way over the canal. It is further submitted that the predecessors of the plaintiff purchased the land which was subject to the right of way. Hence, it cannot be said that the respondents have no right to go through the field of the plaintiff. It is submitted that the defendants are using Block No. 134 and exercising the right of way over it since years together as it is shown from the documents of sale mark 44/2 and 44/3. As such, the defendants have only easement right by prescription and they were using the same since immemorial time. That right has been described by the lower appellate Court as an easementary right. The learned trial Judge has committed an error in holding that the plaintiff has a prima facie case. The right of way is being exercised since 1929 and hence balance of convenience and irreparable loss is not in favour of the plaintiff. As such, the trial Court has committed an error in holding that the balance of convenience and irreparable cannot be compensated in terms of money, are in favour of the plaintiffs.

8. Learned counsel for the respondents submitted that the appellate Court has jurisdiction to reverse the order passed by the trial Court. If that jurisdiction has been exercised by the lower appellate Court this Court should not exercise discretion in revisional jurisdiction merely on the basis that some illegality has been committed by the lower appellate Court.

9. I have carefully considered the rival contention of the learned counsel for the parties and perused the relevant papers on the record. It appears that the defendants have prima facie case to show that they have right of way from 1929 to pass through the land of the plaintiff bearing Block No. 134. That may be or may not be a customary right or easementary right. But it appears that the Courts below have come to the conclusion and found prima facie that the defendants have right to pass through block NO. 134 of the plaintiff. The findings recorded by the appellate Court do not appear to be perverse or illegal. I do not think to come to a different view only on the basis that there some alternative fresh and recent arrangement has been made by the defendants when the injunction order was passed by the trial Court. Therefore, both these revision application are liable to be dismissed.

10. Learned counsel for the petitioner could not point any illegality, jurisdictional error or material irregularity committed by the Courts below. I do not find any reasonable ground calling for interference by

this Court in revisional jurisdiction u/s 115 of the CPC. Accordingly, these Revision Applications are dismissed. Rule is discharged, with no order as to costs. Interim relief granted earlier by this Court, stands vacated, in both these revision applications.

11. In the last, learned counsel for the petitioner requested this Court that the interim relief granted earlier by this Court, be continued for a period of four weeks. In facts and circumstances of this case, I do find any substance in this request. Accordingly, the request made by the learned counsel for the petitioner is rejected.

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/JVSatwara/
Date:-8-9-2000. (Kundan Singh, J.)